Filed 7/11/18 P. v. Austin CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN OSCAR BLACKWELL AUSTIN, Defendant and Appellant.	F073937 (Super. Ct. No. 1465879) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Dawna Reeves, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and F. Matt Chen, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Steven Oscar Blackwell Austin stands convicted, following a jury trial, of first degree robbery (Pen. Code,[1] §§ 211, 212.5, subd. (a); count I), carjacking (§ 215,

[1] All statutory references are to the Penal Code unless otherwise stated.

subd. (a); count II), being a felon in possession of a firearm (§ 29800, subd. (a); count III), and evading a peace officer (Veh. Code, § 2800.2, subd. (a); count V).[2] As to counts I and II, the jury found he personally used a firearm (§ 12022.53, subd. (b)), but did not personally and intentionally discharge a firearm (*id.*, subd. (c)). After a bifurcated court trial, he was found to have suffered a prior conviction for a serious felony that was also a strike, and for which he served a prison term. (§§ 667, subds. (a) & (d), 667.5, subd. (b).) His motion for a new trial was denied, and he was sentenced to a total term of 32 years 4 months in prison. Various financial obligations were imposed.

On appeal, we hold: (1) Austin is not entitled to reversal of his convictions based on the prosecution's failure to preserve evidence; (2) The trial court did not err by instructing on flight; (3) Austin is not entitled to reversal based on alleged prosecutorial misconduct, and so the trial court did not err by denying his motion for a new trial based on the purported misconduct; (4) The prosecutor did not interfere with Austin's right to counsel of his choice; (5) Section 654 does not mandate a stay of sentence with respect to count I or count II; but (6) Austin is entitled to a remand to allow the trial court to decide whether to exercise its discretion to strike either or both firearm enhancements. Accordingly, we affirm the judgment, but remand for further proceedings.

---

[2] Austin was jointly charged, in counts I and II, and tried with Amonte Amos Jones. We omit the counts with which Jones alone was charged, as his case is not before us on this appeal.

The parties stipulated Austin was also known as Steven Mines. He is so referenced in portions of the record.

FACTS

I

PROSECUTION EVIDENCE

As of November 18, 2013, F.C. resided in the 2500 block of Manor Oak Drive, Modesto.[3] At approximately 11:00 that morning, she returned home from grocery shopping and backed her Toyota Highlander SUV into the attached garage. She then unlocked the door leading into the house and began to take her groceries into the kitchen. She left her garage door open.

As F.C. stepped back into the garage, she saw two African-American males looking at the shelves in the garage. Both men appeared to be in their early 20's. One, whom F.C. identified at trial as Jones, was wearing a white hoodie. The one just behind him, whom she identified at trial as Austin, was wearing a black hoodie. Both hoods were up, covering the men's hair. Jones had a silver revolver, while Austin had a black gun.

F.C. said, "Oh, no, no, no, no, no. No, no, no." Both said, "Shut up, bitch. I'll shoot you. I'll kill you." They pointed the guns at her and walked toward her. She covered her face, then collapsed to the ground, screamed for help, and lost bladder control. Jones stepped on her face, and Austin kicked her in the ribs three times. The men told her to get up, and may have grabbed her in her back. They opened the door and put her into the hall closet. She then heard the garage door close.

As F.C. sat in the hall closet, Jones stayed by the door and asked if she had a cell phone.[4] She said she did not. She heard Austin run upstairs. She heard "lots of

---

[3] Unless otherwise specified, all dates in the statement of facts are from the year 2013. In addition, all references to law enforcement personnel are to members of the Modesto Police Department.

[4] F.C. could distinguish the two by their voices. Austin was really angry, while Jones kept yelling at him, "Let's go, let's go. Come on, Kado, let's go, let's go. Hurry up. Hurry up."

wrestling" upstairs, and she kept begging them to take whatever they wanted and just go. Jones, who was still by the closet door, told her to shut up, and that he was trying to help her. His voice was angry, so she fell silent.

When Jones continued to tell Austin to hurry up and it seemed to be taking a long time, F.C. decided to tell them that she had some cash in her underwear drawer. When she said she had money, they demanded to know where. She told them it was in her bedroom and just to take it. She heard both of them run to the bedroom. They asked where the money was, and she told them it was in the dresser with the mirror. She heard "wrestling," and they kept asking where. Austin then said, "The fucking bitch is lying," and he shot a bullet into the bedroom carpet. Jones said, "Fuck, man, let's get out of here." They found cash belonging to F.C.'s husband, and Jones continued to urge that they go. They then told F.C. to stay in the closet. She heard them enter the garage, then her car engine started and she heard them "peel out."

After the vehicle left, F.C. waited about a minute, then left the closet, locked the door leading to the garage, and called 911. During the 911 call (a recording of which was played for the jury), F.C. was hysterical. She related that she had been robbed by two Black men with guns. She thought they stole her car. She said one took her purse, too. She believed they were in their early 20's. One was wearing a white sweatshirt hoodie, and the other one's shirt was "maybe" all black. When F.C. said she thought they also took her cell phone, the dispatcher obtained information about the carrier and cell phone number. F.C. was unable to give any further description of the perpetrators and could not remember the license plate number of her vehicle.

When officers arrived on the scene, F.C. gave them a description of the perpetrators. She said they were African-American and were wearing hoodies, one white and one dark, possibly black. She thought she placed their height at five feet six inches

or six feet.[5] She said they appeared to be about the same height and weight. She also said both guns were black.

At some point, F.C. ascertained that a television, her son's laptop, her purse, her husband's sports socks, an unknown amount of cash, and her Highlander had been taken. In addition, a Wii Fit game system box that had been in her son's closet had been moved.

Erin Gonzales, an identification technician with the Modesto Police Department, processed evidence at the house for latent prints. She found three good-quality prints, one on a Bank of America checkbook box and two on the Wii Fit box. After entering the clearest print from the Wii Fit box into the Automated Fingerprint Identification System (AFIS), she compared the possible matches and concluded the print was made by Austin. Ultimately, she concluded the two prints on the Wii Fit box were made by Austin's left index and right little fingers.[6] She informed detectives Austin was a suspect.

Meanwhile, the police dispatcher activated a "ping" on F.C.'s cell phone.[7] It showed a last location in the area of the Emerald Pointe apartment complex in the 300 block of Standiford, on the property line between the complex and the strip mall that sits at McHenry and Standiford Avenues. Detective Messer checked the area on the afternoon of the robbery, including looking through dumpsters along the property line,

---

[5] At trial, F.C. stated she was five feet three inches tall. The two men were slightly taller than she. She also testified to previously telling a detective the men were six feet tall and approximately 180 pounds.

The parties stipulated that at the time of trial, Jones was five feet 10 inches tall with dress shoes, while Austin was five feet six inches tall with dress shoes.

[6] With respect to the print she identified as having been made by Austin's right pinky finger, Gonzales found 21 points of similarity. With respect to Austin's left index finger, she found 11 points of similarity. Although in the latent print community there is no standard minimum number of points of similarity that are required before a print can be identified, Gonzales's preference is eight such points.

[7] "Pinging" a cell phone allows the cell phone provider to obtain a general physical location for the phone.

but found none of the stolen items. The Highlander was found approximately 300 yards from the apartment complex, however. Officers set up surveillance on it for several hours, but no one returned to the vehicle.

As of November 18, S.F. lived on Manor Oak Drive. She was dating Jones, and had seen him with Austin a couple times. S.F. was unaware of the robbery until Jones and Austin were arrested. She and Jones never discussed his involvement in a robbery. He did, however, tell her that he got two guns from a friend in Riverbank. The discussion occurred before S.F. heard about the robbery. Jones said nothing about how he was going to use the guns.[8]

As of November 19, police had Austin under surveillance. He was driving a tan 1991 Lexus, in which Jones was the passenger.[9] The vehicle was followed to the Emerald Pointe apartments, where Austin went up to apartment 37 for a brief time and then returned to the car. When the Lexus left the apartment complex, Lieutenant Dealba gave directions for a patrol unit to initiate a stop on the vehicle.

Shortly after 3:00 p.m., Officers Griffith and Castro, who were in uniform and in a marked police vehicle being driven by Castro, were directed to the Lexus. It was westbound on Standiford, approximately three-quarters of a mile from the apartment complex. Castro activated his emergency lights and siren, and initiated a high-risk enforcement stop, which involved the officers exiting their vehicle with guns drawn. Austin pulled over, but then accelerated rapidly away. A vehicle pursuit ensued.

---

[8] Detective Pouv interviewed S.F. two days after the robbery took place. S.F. related that after hearing about the robbery, she visited Jones after work. During her visit, she saw Jones in possession of a couple hundred dollars, which she found unusual because he usually did not have that kind of money. S.F. related that during the same conversation, Jones talked about having two guns that he acquired from a friend who lived in Riverbank.

[9] Pouv first began surveilling the Lexus in Ceres. At the time, Austin was driving, but a Black male adult with long dreadlocks — not Jones — was the passenger.

Eventually, the Lexus ran a red light and collided with another vehicle, and Jones and Austin were taken into custody. A chrome .25-caliber semiautomatic handgun with five live rounds in the magazine was found in the pocket of the passenger side door.

No property associated with the robbery was found in the Lexus. When it collided with the other vehicle, however, the Lexus's trunk popped open and items flew out of the trunk. A Pepsi box found in the roadway about 100 feet from the Lexus contained what appeared to be two black semiautomatic pistols. On further examination, they were determined to be Airsoft pistols without the orange safety tips.

After the vehicle crash, Gonzales was asked to compare the print lifted from the Bank of America box with Jones's prints. She determined the print on the box was made by Jones's right thumb.[10] Gonzales also processed the pistol and replica firearms associated with the Lexus, but found no prints identifiable as having been made by Austin or Jones.

After the police chase, Detective Hicks went to apartment 37. He obtained permission from the residents, one of whom was L.W., to search for property taken during the robbery. None was found.

Within a few days following the robbery, F.C.'s son attempted to locate his laptop by using a program that allowed him to log in remotely from his computer. He was able to see the laptop was open to a Facebook page for a particular individual, and he could see the IP address to which the laptop was logged in. Messer spoke with the individual, who lived in Riverbank. She did not know the laptop was stolen.

---

[10] Gonzales found nine clear points of similarity and one point that was in a distorted area where the finger had slipped or moved. She found no dissimilarities.

II

DEFENSE EVIDENCE

Officer Aja was the first officer to arrive on the scene following F.C.'s 911 call. When he spoke to F.C., she described both of the people involved as having black guns. She said the one wearing a white hooded sweatshirt put his hand over her mouth, while the one wearing the black hooded sweatshirt put his foot on her face. When she provided a physical description, she said the perpetrators were about Aja's height. Aja is six feet three inches tall. F.C. also stated she would not be able to identify the perpetrators.

Dr. Haber, who testified as an expert in the fields of fingerprints, perception, and memory as it related to eyewitnesses, explained that the assumption that people's fingerprints are unique to that person has never been tested, although he felt it was probably reasonable. Proper procedure requires a fingerprint examiner or analyst to look for points of dissimilarity when comparing prints. If there is a single discrepancy that cannot be explained (for instance, because there was not enough ink or the pressure might have distorted a ridge), then the finger in question must be excluded as the source of the print from the crime scene.

Haber explained that observer expectancy bias means that if someone expects something to happen, he or she is much more likely to see what is expected than to notice information disconfirming his or her hypothesis. It is a form of selectivity in perception. Confirmation bias is similar. If, for example, a fingerprint examiner makes a comparison and draws a conclusion, confirmation bias can occur if the person asked to check the work knows what conclusion was reached. If a fingerprint examiner is told to examine prints, but a person has already confessed to the crime, there is a bias that makes it more likely the examiner will find a match.

According to Haber, the purpose of AFIS is to try to find exemplar prints that match a print found at a crime scene. If the AFIS system is one that ranks the possible matches, the ranking will always be in terms of similarity. All AFIS systems require the

examiner to mark features he or she sees on the latent print before entering it in the system, thus giving the computer some specific targets for which to look.

Haber explained that the National Academy of Science has found there is no evidence to show individualization.[11] Thus, when an examiner concludes there is an identification, he or she is not excluding anybody else as being the possible source of the print. Haber, who was trained as a fingerprint examiner and had examined thousands of prints, conceded he had never seen two different people have the same fingerprint.

According to Haber, the scientific community has not established an error rate in fingerprint analysis. In his opinion, the best estimate is an error rate of between five and 15 percent. Haber opined there is always a measure of unreliability, because the ability of an examiner to see detail in patterns differs as a function of the training, skill, and experience of the examiner. Haber was not asked to do any sort of fingerprint comparison in this case.

Haber explained there are several known error rates for eyewitness identification, and they depend on the circumstances under which the identification was made. If there is a high level of fear in the encounter, it "reduces dramatically" the accuracy of a subsequent identification. Moreover, if the perpetrator has a gun or other weapon, particularly if it is being used to threaten the witness, the witness tends to look at the gun and not at the face. Fear and the duration of the event also may affect someone's memory of an event. In addition, the victim or witness and the perpetrator being of different races is a factor to consider. In Haber's opinion, all of the foregoing factors would reduce the accuracy with which a witness can recall an event or make an identification of an individual.

---

[11] If, for example, an individual's thumb and the latent print are so similar that the examiner concludes the thumb made the print, this is identification. Individualization means that only that thumb could have been the source of the latent print.

Haber also explained that someone can make use of extraneous information, rather than memory, to make an identification without realizing it. For example, if someone who originally said he or she would be unable to make an identification then made an identification in a courtroom proceeding in which he or she was asked to consider people who were clothed in jail jumpsuits, Haber would consider the identification as biased. The biased procedure would raise concerns about the accuracy or reliability of the identification.

Dr. Davis testified concerning eyewitness identification. She explained that the basic level of inaccuracy is much greater than people assume. People tend to give great weight to eyewitness identifications, but a number of things can affect the witness's accuracy, and there are misconceptions about the conditions under which eyewitnesses can be most accurate. For instance, research has shown that people process the faces of persons they know differently than of those they do not know, making it more difficult to identify correctly an unfamiliar person. The expression on the unfamiliar person's face is also important. If that person is first seen at a crime scene, where he or she may be angry and threatening and menacing, and is then seen in a lineup or somewhere else in which he or she has a neutral facial expression, correct identification is more difficult. In addition, there is salience of internal features. Studies have shown that taking away the outside of the face, such as the ears and the hair, still allows recognition of someone well known to the witness, but adversely affects identification of someone unknown to the witness.

Davis related a study in which the witness was shown a single person, as in a showup, or was shown someone in court, and asked if it was the right person. The results were 85 percent accurate overall; however, 19 percent identified the person even if the correct person was not there. Moreover, the study was conducted under ideal circumstances, and did not involve conditions such as poor lighting, a bad angle of view, cross-race identification, or distraction from focusing on the task of identification. In studies of actual cases, less than half the witnesses, on average, identified the suspect. Of

those who did make identifications, roughly one-third misidentified someone and identified someone out of a lineup that the police knew was innocent. In some studies, as high as 49 percent picked the wrong person.

Davis explained there is less accuracy in identifying members of a different race. This is known as cross-race bias. It may result in failure to identify the correct person or false identification of the wrong person. The problem becomes even more difficult when a face of a different race is seen along with other faces of that race. In addition, there is the issue of inability to recall where a face was seen — for instance, around the neighborhood versus at the crime scene. The ability to remember where the face was seen is not as good with cross-race faces. Also, the ability to tell the difference between two faces is worse in cross-race situations. Finally, in every case, the more time that passes between when the face originally was seen and when the attempted identification occurs, the more difficult accurate identification becomes. Similar problems arise in identifying someone of a different age group.

Davis explained that memory does not record things like a video camera would. It changes and fades over time. Generally, it fails at three stages: when the event occurs (the encoding stage), during storage, and during retrieval.

At the encoding stage, memory may be affected by the opportunity to observe, whether something was interpreted correctly, and whether it made it from short-term memory, which lasts about 30 seconds, to long-term memory. In a complex criminal event, the witness may not have a good opportunity to observe and pay attention, because too many other things draw the person's attention. The more complex the situation, the more there is to process, and the more there is to process, the less time the person can spend on any given thing. Memory depends on attention. In a situation involving a crime, eyes tend to go to the weapon rather than the face. Thus, eyewitness studies have shown that when there is a weapon present, people are less likely correctly to identify the person wielding the weapon than if there is no weapon present.

With respect to traumatic events, Davis explained that people do not forget the event itself. This is a different issue, however, than whether they remember the details correctly. Failure to identify the correct person and mistakenly identifying the wrong person become more likely under high stress.

Davis explained that memory can fade, and it can also become distorted or changed over time. People can be led to remember things that did not happen. This can occur through such events as witnesses talking together about what happened, suggestive interviews, or even the effort of trying to remember engendered by a police interview. It is hard, after someone spends a lot of time picturing something and thinking about it, to be certain whether what appears to be a memory was actually seen originally or was created as part of that effort. New images can be acquired from some other source and then mistaken for actual memories. This is called source-memory confusion, and is the same as "where did I see that face?"

Davis was asked a hypothetical question based on the evidence in this case. In her opinion, the identification issues present included the basic level of accuracy, brevity of exposure, cross-racial identification, stress and trauma, the intervals between the original exposure and identification, the possibility of suggestive questioning, and the changes in stories. Davis opined that earlier reports are a fresher memory and so often should be given more weight; however, when someone is questioned when he or she is so hysterical that he or she can barely think, he or she will be able to answer questions better after calming down and will be able to remember more. Anxiety prevents a person from retrieving things from memory. This is a different issue than whether, once retrieved, the memory has been retrieved accurately. In addition, if the witness is later told there is a fingerprint that matches a suspect and is provided with that suspect's name, or if his or her story changes in response to what he or she subsequently is told by police, that is also a factor to consider with respect to reliability of an in-court identification.

DISCUSSION

I

FAILURE TO PRESERVE EVIDENCE

Austin contends the trial court abused its discretion by denying a motion to dismiss the case in light of discovery violations by the prosecution team. He specifically points to the failure to retain the items from which the latent fingerprints were obtained, and the AFIS list of potential matches to those prints. He says the trial court should have excluded the fingerprint evidence or otherwise imposed sanctions, and the abuse of its discretion denied him his federal constitutional rights to the effective assistance of counsel and due process of law. We find no basis for reversal.

A. Background

Prior to trial, Austin moved for dismissal of the case, pursuant to *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*), based on destruction or loss of evidence. Austin claimed the police had a duty to preserve the Wii Fit and checkbook boxes from which the latent prints were recovered at the crime scene, but instead left the boxes with F.C.'s family, resulting in the destruction of material evidence. Austin asserted the prosecution acted in bad faith, because the apparent exculpatory value of the evidence was clear. He argued the appropriate sanction was dismissal, but if the court declined to dismiss the case, the jury should be instructed to draw any conflicting inference regarding the lost or destroyed evidence in his favor.

The People opposed the motion. They argued it was the fingerprints that were lifted from the boxes, and not the boxes themselves, that embodied the relevant evidence; that relevant evidence was properly collected and preserved. The People further argued that assuming the boxes constituted exculpatory evidence, the failure to preserve them was a case of negligence, not bad faith. The People asserted Austin could analyze the fingerprints himself, since they were preserved; accordingly, he had other reasonable

means by which to obtain the allegedly exculpatory evidence, and so no sanction — even in the form of a jury instruction — was warranted.

A hearing was held that encompassed the motion to dismiss and Austin's motion to exclude fingerprint analysis on *Kelly-Frye* grounds.[12] In conjunction with the *Kelly-Frye* issue, Haber testified the AFIS system is designed to search for people who have fingers that closely match the prints found at a crime scene. Before entering a latent print into the system, the examiner must mark features such as ridge endings or bifurcations. The computer then produces a list of people whose prints share similar features. AFIS ranks the candidates, with the first one being the one the AFIS system says is the most similar person in the database.[13] This can mislead the examiner and is a major source of error, because of contextual bias. The examiner is more likely to find a good match, even if it is not, to the first candidate than to one that falls lower in the ranking. AFIS does not, however, make an identification. It simply measures the amount of similarity between the latent print and the exemplar.

In conjunction with the *Trombetta* issue, Haber explained that normally, whoever finds a latent print at a crime scene will produce the surface on which the print was left. Latent prints are affected by characteristics of that surface. If an examiner only has the latent print, there may be things he or she cannot interpret, or interpret correctly, because the surface of the object may impart additional characteristics. For example, dust on the object will show up under the tape used to lift the print, and will look like part of the print. This can cause mistakes in interpreting the characteristics of the print. The examiner needs to know how heavy the object is, its surface characteristics, its reflective characteristics, whether there is dirt, and whether the surface is uniform or curved or has

---

[12] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013.

[13] California's AFIS system has a database of everyone whose fingerprints have been taken in a police station or under controlled circumstances.

pits in it. In addition, pressure is a major source of distortion of prints. A different pattern may be created by the same amount of pressure, depending upon the construction of the box. Comparison can be done without the surface, but a good fingerprint examiner will be cautious and will be limited in the strength of his or her conclusion without the surface.

Gonzales testified that for fingerprint examiners, a glossy, nonporous surface is preferable, as it allows for better processing and better lifting of latent prints. The Wii Fit box had a semiglossy to high-gloss substrate (surface) that was smooth and nonporous. The checkbook box had a semiglossy, nonporous, smooth surface.

Gonzales explained that distortion of a print can occur for several different reasons, including the amount of pressure that was applied to an object, the surface of the object, or what was on the person's hands when he or she touched the surface. The Wii Fit box was in "pristine" condition. Gonzales did not recall any bends or dents in the cardboard. She entered one of the prints from the Wii Fit box into AFIS to see if she could find a potential match.

With respect to both boxes in this case, Gonzales collected them in the sense she took them to her ID van, where she processed the items.[14] Whether to take such items to the laboratory is left to the discretion of the person processing the scene. Gonzales was not aware of any written guidelines concerning what she should consider in making the decision. Because the boxes belonged to the victim, Gonzales did not want to take them, because she could do nothing more with them at the laboratory. Based on her training

[14] Gonzales also took photographs of the Wii Fit box in the house. She used the camera provided to her by the Modesto Police Department, which she believed took photographs of high resolution. Although she did not control for particulate matter getting onto the box from the time she found it on the stairs to the time she took it outside her van, where she processed it, through her training and experience, she has been able to tell if there is dust on the tape lift.

and experience, nothing was to be gained by keeping those boxes, whether with respect to distortion or reviewing the prints later in comparison with a known print.

At the conclusion of the hearing, the prosecutor argued the print cards had been preserved, and the defense was free to view them and decide whether to have their own expert examine them. He argued there was no evidence anything exculpatory was lost, and there was no bad faith. Defense counsel asserted Haber's testimony refuted the position that everything that could be gotten from the evidence was available from the prints and photographs.

The trial court denied the dismissal motion, stating:

> "The way I read the *Trombetta* case, in order for the evidence to be excluded, there has to be some apparent exculpatory value at the time that the evidence was destroyed and there has to be a showing of bad faith.
>
> "In this case, it doesn't appear to me that there is any apparent exculpatory value. Certainly, if the defense had the box, they might be able to make some unknown argument about what they could or could not find on the box.
>
> "But, the evidence that's being proffered here is the actual latent print. The latent print is still available in the form of the latent print card.
>
> "I don't have to reach the second element of bad faith because there is no exculpatory value that's apparent at the time the box was not collected. [¶] … [¶]
>
> "The motion to exclude the evidence under *Trombetta* is denied.
>
> "I might add, if I follow the defense argument to its logical end, it would require every time the police lift a print from any surface, before they even evaluate it they have to then also maintain the surface because when they lift a print they don't know if that's going to be a match to somebody or is not going to be a match.
>
> "If I were to follow the defense argument to its natural end, that would be every piece of glass, every table, every window, every car door, every doorknob that they lift a latent print would have to be collected to avoid this *Trombetta*-type motion, because if they develop a print that then leads to a suspect the defense would be entitled to that doorknob.

"That's just not what the law is. There hasn't been anything beyond that argument that's been presented here."

The issue of the AFIS list arose again in the context of the parties' in limine and pretrial motions. Counsel for Austin represented Gonzales's report showed that when Gonzales ran the latent prints through AFIS, the system delivered a list of 18 possible matches, of which Austin was number 11. Counsel wanted the list for potential impeachment of Gonzales's identification of the fingerprint or third-party culpability. The prosecutor was able to provide a screen shot taken by Gonzales of numbers eight through 15. He represented it was the only thing that had ever been available, as it was not Gonzales's practice to take multiple screen shots. He also explained that due to the technology of AFIS, it was impossible to re-create numbers one through seven, because if the latent print were reentered into the system, a different set of matches might be returned.

The court stated it understood the technology to be that the computer would return what it saw as possible matches, whereupon it was up to the human to figure out which one was the match. That being the case, the original list was no more beneficial than any other list, because all the defense needed was other possible matches. If the defense found someone else whose fingerprint was a better match than Austin's print, that was what would be exculpatory, not whether other people, who the Modesto Police Department did not think were hits, were on the list. Defense counsel disagreed, and argued the original list was potentially exculpatory or at least "ripe for impeachment" of Gonzales, because those matches were what Gonzales examined. Counsel represented the defense would have asked for information corresponding to what was on the list, then found out if one of those people matched third-party suspects known to exist in this case, such as the residents of apartment 37.

Defense counsel conceded she was not asking for dismissal of the case based on the fact she did not have the entire list, but she asserted the evidence of the fingerprint

should be excluded. The court denied the request, as well as the defense's request for a jury instruction on the untimely disclosure of evidence. The court observed: "The Court does not see that [the screen shot of the partial AFIS list] is exculpatory on its face. We have had extensive hearings about fingerprints, and I believe that the fingerprint evidence in this case just basically is what it is. [¶] Just because the automated system returned a number of possible matches that the police department figured were not matches, and they now say that Mr. Austin's finger is a match to the print collected does not mean that any of these other prints are exculpatory and those people are associated with the crime."[15]

B. Analysis

"The constitutional due process rights of a defendant may be implicated when he or she is denied access to favorable evidence in the prosecution's possession. (*Brady v. Maryland* (1963) 373 U.S. 83.) *Trombetta* outlines how the state's failure to preserve evidence may violate those rights. In *Trombetta*, the high court limited the state's affirmative duty to preserve evidence to that which 'might be expected to play a significant role in the suspect's defense.' (*Trombetta, supra,* 467 U.S. at p. 488.) This standard of 'constitutional materiality' imposes two requirements that a defendant must meet in order to show a due process violation. As an initial matter, the evidence must 'possess an exculpatory value that was apparent before [it] was destroyed.' (*Id.* at p. 489.) Additionally, it must 'be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' " (*People v. Lucas*

---

[15] The Attorney General now contends Austin's *Trombetta* claim with respect to the AFIS list has been forfeited, because Austin did not raise the issue below. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1300.) Austin has not addressed this claim of forfeiture. Nevertheless, we conclude, particularly in light of the trial court's references to the previous hearings concerning fingerprints and its other comments about exculpatory value, the issue was adequately preserved for appeal.

(2014) 60 Cal.4th 153, 221 (*Lucas*), disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.)

"On review, we must determine whether, viewing the evidence in the light most favorable to the trial court's finding, there was substantial evidence to support its ruling." (*People v. Roybal* (1998) 19 Cal.4th 481, 510 (*Roybal*).) Under this standard, the trial court did not err in concluding that neither the boxes nor the AFIS list possessed an exculpatory value that was apparent before it was released to F.C. (in the case of the Wii Fit and checkbook boxes) or not preserved (in the case of the AFIS list).

With respect to the boxes, it is undisputed that the latent prints themselves were preserved, and were of sufficient quality for comparison purposes. The boxes themselves possessed no apparent exculpatory value at the time Gonzales processed and released them, particularly in light of their surfaces and conditions. (See, e.g., *Lucas*, *supra*, 60 Cal.4th at pp. 220-221; *People v. Duff* (2014) 58 Cal.4th 527, 548-549; *Roybal*, *supra*, 19 Cal.4th at pp. 508-509, 510; *People v. Medina* (1990) 51 Cal.3d 870, 893, affd. *sub nom. Medina v. California* (1992) 505 U.S. 437; *People v. Johnson* (1989) 47 Cal.3d 1194, 1234-1235, overruled on another ground in *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1174.) With respect to the AFIS list, Gonzales compared the prints on the list and determined defendant's prints were the ones that matched the latent prints found on the Wii Fit box. In light of her determination, the remaining entries on the list did not possess an apparent exculpatory value. (See, e.g., *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1000.)

"Destroyed evidence with only potential, rather than apparent, exculpatory value is without remedy under *Trombetta*, but *Youngblood* provides a limited remedy when the state has acted in bad faith in failing to preserve the evidence.… [In *Youngblood*, t]he court held that 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process

of law.' ([*Youngblood*, *supra*, 488 U.S.] at p. 58.)" (*Lucas*, *supra*, 60 Cal.4th at pp. 221-222.)

Assuming the boxes and AFIS list might be said to have potential exculpatory value, the record discloses no evidence of bad faith.[16] "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Youngblood*, *supra*, 488 U.S. at p. 56, fn. *.) The police here had no knowledge the boxes or list might be exculpatory, and they did not fail to preserve the items to gain some tactical advantage over Austin or to circumvent constitutional or statutory disclosure requirements. (See *id*. at p. 57; *Trombetta*, *supra*, 467 U.S. at p. 488; *People v. DePriest* (2007) 42 Cal.4th 1, 42.) Under the circumstances of this case, bad faith has not been shown even assuming counsel for Austin had made a discovery request encompassing the AFIS list at the time the list was destroyed. (See *Illinois v. Fisher* (2004) 540 U.S. 544, 548; *People v. Carrasco* (2014) 59 Cal.4th 924, 962.)

In light of the foregoing, Austin has failed to demonstrate a violation of his rights to due process or the effective assistance of counsel. He was not entitled to have the court impose any kind of sanction at trial (see *Lucas*, *supra*, 60 Cal.4th at p. 222; *People v. Cook* (2007) 40 Cal.4th 1334, 1351; *People v. Cooper* (1991) 53 Cal.3d 771, 811), and he is not entitled to have his convictions set aside on appeal.

II

FLIGHT INSTRUCTION

The People requested that the court instruct the jury on flight, pursuant to CALCRIM No. 372. Austin objected, arguing his attempt to evade pursuing officers occurred neither immediately after the crime was committed nor after he was accused of

[16] Because the trial court did not reach this issue, we will independently review the evidence.

committing the crime. Austin asserted the instruction would shift the burden from the prosecution to the defense, because in order to counter the notion failing to yield to the traffic stop constituted evidence Austin was aware of the events at F.C.'s house, Austin would have to explain why he failed to yield.

The court ruled Austin was free to argue to the jury that his failure to yield did not show consciousness of guilt, but the prosecutor was free to argue the contrary. The court concluded the instruction was appropriate under the facts of the case, since the alleged flight was only 24 hours after the robbery. Accordingly, it instructed the jury: "If a defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that a defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Austin now contends the trial court erred by instructing on flight. He says the instruction was unwarranted in the present case, and lessened the People's burden of proof. We conclude the instruction was properly given.

" 'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.' " (*People v. Valdez* (2004) 32 Cal.4th 73, 137.) "Instruction on an entirely permissive inference is invalid as a matter of due process only if there is no rational way the jury could draw the permitted inference." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243-1244.)

As the United States Supreme Court has recognized, there may be reasons for flight apart from consciousness of guilt. (E.g., *Illinois v. Wardlow* (2000) 528 U.S. 119, 125; *Wong Sun v. United States* (1963) 371 U.S. 471, 483, fn. 10.) Nevertheless, a flight instruction generally " 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a

consciousness of guilt.' [Citations.] ' "[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." ' " (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) Evidence a defendant merely left the scene is not sufficient, standing alone. (*People v. Boyce* (2014) 59 Cal.4th 672, 690 (*Boyce*); *People v. Bonilla* (2007) 41 Cal.4th 313, 328 (*Bonilla*).)

"An instruction in substantially [the] form [of CALCRIM No. 372] *must* be given whenever the prosecution relies on evidence of flight to show consciousness of guilt. (§ 1127c.) A flight instruction is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual environs, or of his escape from custody after arrest, logically permits an inference that his movement was motivated by guilty knowledge." (*People v. Turner* (1990) 50 Cal.3d 668, 694, fns. omitted.) "To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*Bonilla, supra*, 41 Cal.4th at p. 328.) The evidence of flight need not be uncontradicted. (*People v. Richardson* (2008) 43 Cal.4th 959, 1020 (*Richardson*).) Moreover, the instruction is properly given even if identity is a contested issue, if there is evidence identifying the person who fled as the defendant. (*People v. Jones* (1991) 53 Cal.3d 1115, 1144-1145.)

The California Supreme Court repeatedly has rejected claims the standard flight instruction creates an unconstitutional permissible inference or lessens the prosecution's burden of proof. (E.g., *People v. Cage* (2015) 62 Cal.4th 256, 286; *Boyce*, *supra*, 59 Cal.4th at p. 691; *People v. Avila* (2009) 46 Cal.4th 680, 710; *People v. Kelly* (2007) 42 Cal.4th 763, 792.) Although these cases considered the version of the instruction contained in CALJIC No. 2.52, we have reached the same conclusion with respect to CALCRIM No. 372. (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1159.)

To the extent Austin is arguing the instruction had such an effect when applied specifically to him, we reject his claim in light of the evidence presented at trial.

The evidence was uncontradicted that Austin attempted to flee from police just slightly more than 24 hours after the robbery. That the flight could have been occasioned by consciousness of guilt about some other crime (for example, the gun in the vehicle) does not preclude the inference Austin attempted to flee in order to escape capture for his more serious crimes the day before. (See *People v. Loker* (2008) 44 Cal.4th 691, 706.)

Nor was Austin's flight from police "too far removed from the alleged robber[y].… '[T]he instruction neither requires knowledge on a defendant's part that criminal charges have been filed, nor a defined temporal period within which the flight must be commenced.…' [Citation.] [The California Supreme Court] has held that flight is relevant to show consciousness of guilt even when the flight occurred four weeks after a murder. [Citation.] Here, defendant tried to evade the police in a high-speed car chase just one day after he participated in [a home invasion robbery and carjacking]. ' "Common sense … suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as [home invasion robbery and carjacking] after only a few days." ' " (*People v. Leon* (2015) 61 Cal.4th 569, 607 (*Leon*); see *People v. Sanchez* (1939) 35 Cal.App.2d 231, 237 [the fact flight was "from the presence of the threatening police and not from the looted premises does not diminish its efficacy as evidence or reduce its weight as proof"].)

Nor do we believe inclusion of the word "immediately" rendered the instruction improper. (Cf. *People v. Carrera* (1989) 49 Cal.3d 291, 313-314.) F.C. testified that Jones repeatedly urged Austin to go, and that when they left, her car "peel[ed] out." This was sufficient to permit jurors to infer flight immediately after the crimes. (See *People v. Wiley* (1939) 33 Cal.App.2d 424, 428.) Although the prosecutor did not argue this evidence to the jury as constituting flight that demonstrated a consciousness of guilt, it is entirely possible jurors interpreted it as such. If that occurred, the instruction benefited

the defense " 'by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." ' " (*Leon, supra*, 61 Cal.4th at p. 608.) The instruction assumed neither that flight was established nor that Austin fled; rather, both existence and significance were left to the jury. (*People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183; *People v. Crandell* (1988) 46 Cal.3d 833, 870, overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) If jurors found Austin was not one of the perpetrators or his flight was not shown or did not demonstrate consciousness of guilt as to the charged offenses, "they would have disregarded the flight instruction as they were also instructed." (*Richardson, supra*, 43 Cal.4th at p. 1020.)[17]

III

PROSECUTORIAL MISCONDUCT IN ARGUMENT AND RELATED NEW TRIAL MOTION

Austin contends the prosecutor committed misconduct by improperly implying a defense burden to produce evidence and by vouching for a witness. He further contends the trial court erred by denying his motion for a new trial, the basis for which was the prosecutor's alleged misconduct in closing argument. We reject both claims.[18]

A. General Legal Principles Applicable to Claims of Prosecutorial Misconduct

"A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Cook* (2006) 39 Cal.4th 566, 606.)

---

[17] Pursuant to CALCRIM No. 200, jurors were told: "Some of these instructions may not apply, depending on your findings about the facts of the case. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

[18] We address Austin's claim the prosecutor also committed misconduct by attempting to interfere with Austin's right to counsel of his choice, *post*.

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 31.) "A claim will not be deemed forfeited due to the failure to object and to request an admonition only when 'an objection would have been futile or an admonition ineffective.' " (*People v. Thomas* (2012) 54 Cal.4th 908, 937.)

"When a defendant makes a timely objection to prosecutorial argument, the reviewing court must determine first whether misconduct has occurred, keeping in mind that ' "[t]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom" ' [citation], and that the prosecutor 'may "vigorously argue his case." ' " (*People v. Welch* (1999) 20 Cal.4th 701, 752-753.) "When a claim of misconduct is based on the prosecutor's comments before the jury, … ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.) In reviewing the prosecutor's comments, "we do not lightly infer that the prosecutor intended his remarks to have their most damaging meaning or that the jury drew that meaning rather than the less damaging one." (*People v. Howard* (1992) 1 Cal.4th 1132, 1192.)

B. <u>Implying Defense Burden</u>

Austin contends the prosecutor improperly implied a defense burden to produce evidence. Austin also complains of the prosecutor's telling the jury what a defense witness would have said if called to testify. We conclude that, to the extent the claims were preserved for appeal, no misconduct occurred.

1. Background

Austin's defense challenged the reliability of fingerprint comparison analysis, both in general and as performed by Gonzales. During the prosecutor's opening argument, the following took place:

> "[PROSECUTOR]: Now, obviously lawyers, you know, we talk and talk and we spend a lot of time, sometimes more than we should. But at times, whenever we are in a trial, ladies and gentlemen, we — it's not what we are even talking about, it's not what the questions and answers are. It's what you don't hear. What you don't see.
>
> "And I will tell you right now, there is one person that we never heard from, and it doesn't matter how much time we waited, you would never hear from, and that's the defense fingerprint analyst. Not the scientist who is going to come in and just criticize and say you can't believe fingerprints ever, but it's the actual defense fingerprint analyst.
>
> "You know, and the burden of proof is always on the prosecution and that's exactly the way it should be. There are lots of very good constitutional reasons for that. But, in the state of California you are allowed to hold the failure to call logical witnesses against the defense. And that's all I'm asking here is, where is the defense fingerprint analyst? And I've got to tell you right now —
>
> "[COUNSEL FOR AUSTIN]: Objection, Your Honor. The defendant has no requirement to prove or to demonstrate any evidence at all.
>
> "THE COURT: That's exactly what he said …. It's overruled. [¶] [Prosecutor], move along, please.
>
> "[PROSECUTOR]: Sure. And if there was an analyst who is willing to do the analysis and say, guess what, you got the wrong guy, I have checked the cards, I have done the comparison, I have looked at it. And it's not Mr. Austin's print.
>
> "[COUNSEL FOR JONES]: I will join the objection.
>
> "THE COURT: Objection is noted. It's overruled.
>
> "[PROSECUTOR]: It's not Mr. Austin's print. It's not Mr. Jones's print. [¶] You never heard that. Why? Because there was no one willing

to do that, because if somebody makes that analysis they are going to come in here and help me convict these gentleman.

"[COUNSEL FOR AUSTIN]: Objection. Your Honor, I have to at this point renew my objection to improper burden shifting.

"THE COURT: The objection is noted. It's overruled.

"[PROSECUTOR]: And that person is not coming. And, yes, the burden of proof is always on me. That's the right call; it should be. But, you can't [*sic*] ask yourself, well, why are we hearing from these other witnesses but not the only one that would really matter? And that is somebody who comes in with a similar presentation [to that given by Gonzales] with arrows saying here's where it's different …. Here's where something is wrong. And it would be irresponsible for you to come in and say this person left this fingerprint because I have done my analysis, and it's not these guys. That person is never coming because they would help me convict these two."

A short while later, this ensued:

"[PROSECUTOR]: Now, what's the defense case about? The defense case, once again silly lawyer term, collateral attack. That is the word for what they are trying to do in this case. There is [*sic*] two ways to challenge pieces of evidence. There is a direct attack and a collateral attack.

"A direct attack, again, would be bringing that fingerprint analyst that doesn't exist to come and say, 'I did an analysis. You have the wrong guys.'

"[COUNSEL FOR AUSTIN]: Objection.

"[COUNSEL FOR JONES]: I'll renew my objection to make a continuing objection.

"THE COURT: Objection is noted by both defendants. Overruled.

"[PROSECUTOR]: And what they are doing is just trying to do an end run around. They want to challenge it without challenging it. That's what that's about. If there was a way to challenge it, a way to find that witness, they would bring them up here and they would be sitting in that chair telling you all about it with their arrows and their presentation. Never coming. Why is that? Well, it's because the prints are theirs."

During the prosecutor's final summation, this took place:

"[PROSECUTOR]: And, you know, … [counsel for Austin] said, well, you know, Erin Gonzales isn't looking for inconsistencies. And just as I said yesterday, if there were any inconsistencies you would have heard about it. You would have heard about it.

"[COUNSEL FOR AUSTIN]: Objection. Improper shifting of the burden.

"THE COURT: Overruled.

"[PROSECUTOR]: You would have heard about it. And you would have either heard about it because they would have gotten Ms. Gonzales to concede it or, as I said yesterday, there would be a defense witness coming in to say let me show you all … these errors —

"[COUNSEL FOR JONES]: Objection —

"[COUNSEL FOR AUSTIN]: Objection.

"[COUNSEL FOR JONES]: — just for the record.

"THE COURT: Objection is noted by both defendants and is overruled.

"[PROSECUTOR]: And you can use the failure to call logical witnesses against them, despite whatever objections are made. I would not be saying this if I was wrong."

Austin subsequently moved for a mistrial based on the foregoing asserted prosecutorial misconduct. After argument, the trial court denied the motion. The court viewed the prosecutor's argument as being "fair comment" on failure to call a logical witness.

2. Analysis

"A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. [Citation.] Comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible. [Citation.] However, a prosecutor may not suggest that 'a

defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' " (*People v. Woods* (2006) 146 Cal.App.4th 106, 112 (*Woods*); accord, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1195-1196 (*Young*); *People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (*Bradford*).)

Examining the challenged comments in context, for the most part we find no misconduct: "[T]he prosecutor did not cross the critical line, as there is no reasonable likelihood the jurors would have understood the prosecutor's argument as imposing any burden on" Austin. (*Young*, *supra*, 34 Cal.4th at p. 1196.) The prosecutor emphasized the burden of proof always remained on the People. Under the circumstances, it would have been logical for the defense to call a fingerprint analyst to rebut Gonzales's identification of the latent prints, had those prints not matched those of Austin and/or Jones. The prosecutor's comments did not impermissibly shift the burden of proof to the defense. (See, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 406-407; *Bradford*, *supra*, 15 Cal.4th at pp. 1339, 1340; cf. *People v. Hill* (1998) 17 Cal.4th 800, 831-832 (*Hill*); *Woods*, *supra*, 146 Cal.App.4th at pp. 112, 113-114.)

The prosecutor's comments that had the defense called a fingerprint analyst, that person would have helped the prosecutor convict the defendants, and that he (the prosecutor) would not say jurors could use the failure to call logical witnesses against the defense if he were wrong, are more problematic in terms of their propriety. (See *People v. Hall* (2000) 82 Cal.App.4th 813, 817; *People v. Gaines* (1997) 54 Cal.App.4th 821, 824-825 (*Gaines*).) However, Austin either failed to object to these comments in a timely manner, when an objection and admonishment would have cured any harm (see *People v. Avena* (1996) 13 Cal.4th 394, 442), or failed to state grounds for his objection that actually applied. He fails to convince us such objections would have been futile or that admonitions could not have cured any potential harm. Accordingly, his claims regarding these comments have not been preserved for appeal. (*People v. Covarrubias*

(2016) 1 Cal.5th 838, 893-894; see, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 757 (*Medina*); *People v. Miller* (1990) 50 Cal.3d 954, 996.)

In any event, assuming misconduct, it was not prejudicial. The one personalized remark was brief, innocuous, and linked to a point of law as to which the prosecutor was correct. It cannot conceivably have prejudiced Austin. (See *Medina*, *supra*, 11 Cal.4th at pp. 757-758.) The references to the uncalled witness helping the prosecutor convict the defendants were simply extensions of the prosecutor's proper comments on the defense's failure to call a logical witness. In light of that linkage, the brevity of the references, the trial evidence, the remainder of the prosecutor's argument, and the fact jurors were instructed that nothing the attorneys said was evidence, we are satisfied beyond a reasonable doubt that any misconduct did not affect the jury's verdict. (Cf. *Gaines*, *supra*, 54 Cal.App.4th at pp. 825-826.)

C. Vouching

Austin further contends the prosecutor committed misconduct by vouching for Gonzales, particularly in the two instances we have italicized, below. We disagree.

1. Background

At trial, Gonzales gave a PowerPoint presentation explaining fingerprint analysis and showing the analysis she performed in this case. As previously noted, the defense attacked the reliability of fingerprint analysis in general, and Gonzales's analysis in particular. The prosecutor told jurors, in pertinent part:

> "Now, I don't know if you guys were like me in school, you know, maybe you didn't care about showing your work, you didn't want to show your work in math class. But, Ms. Gonzales, she showed her work. She did that using the court exhibits. You can look at it up close, if you want to do that. This is a copy of one of her slides. This is the first one as to Mr. Austin.
>
> "And she is showing you her work. She could have just as easily taken the stand and said, I looked at it. Here's all the points of similarity, you know, here's why I'm smart and you should believe me, let's go home.

"But, she showed her work. And you can look at it yourself. You can see all of the points of similarity. You can check the arrows from the print taken from the scene. You can check her work. You don't even have to believe her. You can see how these points of similarity are right there in front of you. Okay. And your original print cards are in evidence as well, if you want to do the raw comparison. She has shown her work. She is looking for that A-plus grade. *She knows what she is doing.* Okay.

"And you can see it here on Mr. [Austin's] first finger, the right pinky finger. Now I'm showing the copy for his number seven finger, that left index finger, the same thing. You can see it plan as day; the bifurcations, the ridge endings. It's the guy. *You don't have to just take her word for it; although, there is no reason not to,* but you can actually make the analysis yourself.

"[COUNSEL FOR AUSTIN]: Objection. Impermissible vouching.

"THE COURT: Overruled.

"[PROSECUTOR]: You can see it yourself, ladies and gentlemen. Just take a look at it. You can do your own comparison, if you wish. She is showing her work for you." (Italics added.)

2. Analysis

"[A] prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses." (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946 (*Padilla*), overruled on another ground in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.) However, "[a] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his] office behind a witness by offering the impression that [he] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [his] comments cannot be characterized as improper vouching."

(*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).)

Austin's argument to the contrary notwithstanding, it is absolutely clear that the prosecutor here "simply drew inferences as to credibility on the basis of evidence presented to the jury," which he was entitled to do. (*Padilla*, *supra*, 11 Cal.4th at p. 946.) His remarks "would not have been understood by the jury to vouch for [Gonzales's] credibility based on the prosecutor's personal beliefs or evidence outside of the record." (*People v. Peoples* (2016) 62 Cal.4th 718, 796.) There was no misconduct. (*Ibid*.; see, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 741; *Medina*, *supra*, 11 Cal.4th at p. 757.)

D. <u>New Trial Motion</u>

Austin moved for a new trial based on asserted prosecutorial misconduct. Not surprisingly, the People opposed the motion. After argument, the trial court stated it found the prosecutor's argument to the jury "strenuous," but it concluded there was neither burden shifting nor improper vouching. Accordingly, it denied the motion. Austin says the trial court erred. It did not.

A new trial may be granted "when the district attorney … has been guilty of prejudicial misconduct during the trial thereof before a jury …." (§ 1181, subd. 5.) " ' " 'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard." [Citations.] " 'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.' " ' " (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.)

Austin presented his claims of prosecutorial misconduct on appeal, independent of his new trial claim. Since we have found little, if any misconduct, and none that was prejudicial, it follows that the trial court did not abuse its discretion by denying the motion for a new trial based on said purported misconduct. (See *People v. Panah* (2005) 35 Cal.4th 395, 490.)

IV

INTERFERENCE WITH RIGHT TO COUNSEL OF CHOICE

Austin contends the prosecutor intentionally attempted to interfere with Austin's right to counsel of his choice. He says the prosecutor's misconduct in this regard effectively prejudiced him and his ability to present a defense to the charges. He argues the defect is a structural one requiring reversal without assessment of prejudice, but at the least, reversal is required unless we are satisfied beyond a reasonable doubt the error was not harmless. We find no cause for reversal.

A. Background

On December 19, 2014, the prosecutor filed a motion asking the trial court to determine if a conflict of interest existed that prevented Austin's counsel from representing Austin, who was in custody. The People stated their understanding that the Stanislaus County Sheriff had advised the court, by letter, that an "intimate physical encounter" between defense counsel and a different in-custody defendant had been observed by a custodial deputy during an attorney-client visit, as a result of which defense counsel was currently barred from visiting all in-custody inmates. The People asked the court to inquire to ensure Austin did not have a conflict or was willing to waive any conflict in regard to counsel's representation, in light of the fact counsel would be unable to visit him in jail. The People asked for further inquiry of Austin by the court because of the potential for physical contact of an intimate nature to have occurred between counsel and Austin. The People asked that the court relieve defense counsel and obtain a conflict-free attorney if the court, after inquiring, believed the difficulties would deprive Austin of a fair trial.

Defense counsel filed a written reply and objection, in which she accused the district attorney's office of making "malicious, unsupported, and speculative allegations" that left it liable to damages for defamation. Counsel asserted the People's allegations were speculative and factually unsupported. Counsel argued the motion was an attempt

to interfere with effective assistance of counsel and the attorney-client relationship. Counsel further asserted the motion was based on purely speculative and unfounded allegations, and therefore constituted an attack upon the integrity of defense counsel and, hence prosecutorial misconduct. Counsel asked that the People's motion be denied.

The motion was heard on January 16, 2015.[19] At the hearing, the prosecutor stated his office did not have any specific information relating to Austin. As a result, the court declined to make any inquiry about the relationship between Austin and defense counsel, but agreed to inquire about the access issue. Following a closed hearing with Austin and defense counsel, the court found no conflict.

B. Analysis

"Our system of criminal jurisprudence has long recognized the right of an accused to be aided by effective assistance of counsel of his own choosing at all critical stages of criminal proceedings." (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 431 (*Boulas*).) Thus, a defendant has a constitutional right " 'to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.' " (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144 (*Gonzalez-Lopez*).)

---

[19] It is apparent, from defense counsel's declaration of disqualification against the trial judge (Code Civ. Proc., § 170.1) and the trial judge's verified answer, that another deputy district attorney filed a virtually identical motion in a case involving defense counsel and a different defendant on December 16, 2014. That motion was heard on January 9, 2015. At the hearing, defense counsel asserted that the court in another department had already addressed the issue with a different client and found no conflict because of the access issue, because counsel's office included other attorneys and investigators that had access to in-custody clients, and counsel was available by telephone. The trial judge stated the fact there were allegations in some other case with some other defendant did not make it likely those same allegations were occurring with respect to any other defendant. Accordingly, the trial judge declined to make inquiry with regard to the personal allegations, but did inquire, in a private hearing, about the access issue. At the conclusion of that hearing, the trial judge found no conflict.

"The right to assistance of counsel is 'indispensable to the fair administration of our adversarial system of criminal justice,' and 'safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.' " (*Boulas, supra,* 188 Cal.App.3d at p. 431.) " 'The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.' " (*Gonzalez-Lopez, supra,* 548 U.S. at p. 146.) "Where the right to be assisted by counsel of one's choice is wrongly denied, … it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." (*Id.* at p. 148.)

"The state is obliged 'to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command.' [Citation.] The state must respect, and not interfere with, a defendant's 'right to decide for himself who can best conduct the case ….' " (*Boulas, supra,* 188 Cal.App.3d at p. 431.) On the other hand, "[w]here a constitutional right to counsel exists, … there is a correlative right to representation that is free from conflicts of interest." (*Wood v. Georgia* (1981) 450 U.S. 261, 271.) Under both the federal and state Constitutions, "a defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant." (*People v. Rundle* (2008) 43 Cal.4th 76, 168, disapproved on another ground in *Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

"When the trial court knows, or reasonably should know, of the possibility of a conflict of interest on the part of defense counsel, it is required to make inquiry into the matter. [Citations.] It is immaterial how the court learns, or is put on notice, of the possible conflict, or whether the issue is raised by the prosecution [citation] or by the

defense [citation]. [¶] The trial court is obligated not merely to inquire but also to act in response to what its inquiry discovers. [Citation.] In fulfilling its obligation, it may … make arrangements for representation by conflict-free counsel. [Citation.] Conversely, it may decline to take any action at all if it determines that the risk of a conflict is too remote." (*People v. Bonin* (1989) 47 Cal.3d 808, 836-837.)

In *People v. Harris* (2005) 37 Cal.4th 310 (*Harris*), the prosecution moved for a hearing to determine whether a conflict of interest existed between the defendant and his counsel, where counsel's office previously represented a prosecution witness. Before the hearing could be held, the witness died. The trial court determined his death rendered moot the question of a conflict, and, without objection, took the prosecution's motion off calendar. Counsel continued to represent the defendant through the guilt and penalty phases of trial, although the defendant represented himself at the motion for new trial. (*Id*. at p. 342.)

On appeal, the defendant characterized the filing of the conflict motion as prosecutorial misconduct. He argued it sowed seeds of distrust in his mind regarding counsel's representation, and created an atmosphere of mistrust that ultimately resulted in the breakdown of the attorney-client relationship. (*Harris*, *supra*, 37 Cal.4th at p. 342.) The state high court was not persuaded. It stated: "Assuming for argument the issue was preserved, it is meritless. The prosecution had the right to protect itself. Whether a conflict of interest exists such that a defendant should have a different attorney is a very sensitive matter. The prosecution could legitimately be concerned that if the court had not examined the question, any conviction it received might have been doomed to reversal on appeal even before the trial began. [Citation.] We see no impropriety in the prosecution's cautiously seeking a determination before trial whether a conflict existed rather than waiting for a defense challenge to a conviction after trial. [¶] Moreover, the record does not suggest that defendant mistrusted counsel due to the prosecutor's conduct or that counsel failed to represent defendant adequately." (*Ibid*.)

We find *Harris* on point. Austin contends he "was assuredly left with doubt as to an ability" to discuss the case with his attorney, and that the motion "certainly impacted defense counsel and her ability to effectively represent her client …." These assertions find no support whatsoever in the record, and do not become fact merely because they are forcefully proclaimed.[20] Austin was well aware of how to bring complaints about counsel to the court's attention, having made a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 early in the case, when he was represented by the public defender's office. We find it significant he voiced no concerns about trial counsel. (See *People v. Delgado* (2017) 2 Cal.5th 544, 566.)

It would have been preferable had the prosecutor not included in his motion a request for inquiry concerning potential inappropriate contact between counsel and Austin, since, as the prosecutor admitted, his office had no specific information in that regard. The trial court's finding with respect to those allegations in the previous case had not been made at the time the prosecutor filed his motion in Austin's case, however. Moreover, in light of the prosecutor's admission and the fact the trial court made no inquiry of counsel and Austin in that regard, there was no interference with Austin's right to counsel of choice. The trial court properly inquired with respect to the access issue; the fact no conflict was found in other cases was immaterial here, since whether a conflict reasonably might be found to exist on that ground necessarily varies from case to case and client to client.

We conclude there was no intentional interference with Austin's right to counsel of his choice, such that requires reversal without regard to prejudice. To the extent the

---

[20] Austin says issues related to his ability to communicate with counsel due to interference by jail personnel with legal documents arose throughout the case. If anything, this suggests to us that the prosecutor and court rightly were concerned about access issues, since "[t]he right of access to counsel is an essential component of the right of access to the courts." (*In re Grimes* (1989) 208 Cal.App.3d 1175, 1182.)

prosecutor's inclusion of the ground for which he had no specific information might be deemed attempted interference, we find no authority requiring reversal where, as here, counsel continued to represent Austin and nothing in the record suggests any adverse impact on Austin's confidence in counsel, counsel's ability effectively to represent her client, or the attorney-client relationship.

V

SENTENCING ISSUES

A. Failure to Stay Term Imposed for Carjacking

In his sentencing statement, Austin argued the carjacking and robbery were committed pursuant to one primary objective and intent, namely to find, take, and profit from F.C.'s items by taking her car; hence, execution of sentence on the carjacking count should be stayed pursuant to section 654. The prosecutor argued the contrary. The court declined to stay the sentence, finding counts 1 and 2 "appeared to have separate criminal motives."

Jones now contends the trial court erred by failing to stay the term imposed for carjacking. He argues the crimes of robbery and carjacking "were unified in virtually every conceivable way," the force and fear required to establish both "was committed at one time and in one location," and both were committed pursuant to "the *ultimate objective*" of stealing F.C.'s property. We conclude the trial court did not err.[21]

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

[21] Austin observes that no objection to the imposition of sentence was raised below. We need not decide whether the argument made in his sentencing statement constituted an objection, since, as Austin further observes, no objection on section 654 grounds is required at sentencing to preserve the issue for appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Scott* (1994) 9 Cal.4th 331, 354 & fn. 17.)

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654's purpose is to ensure that punishment is commensurate with an offender's culpability. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) Thus, the statute "precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct." (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268 (*Cleveland*); see *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the [People] and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313; accord, e.g., *People v. Mejia* (2017) 9 Cal.App.5th 1036, 1046; *Cleveland, supra*, 87 Cal.App.4th at p. 271.)[22]

[22] Where the facts are conceded, the question is one of law. (*Harrison, supra*, 48 Cal.3d at p. 335; *People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.) Here, the trial court made a factual determination based on evidence that was disputed. Accordingly, we do not believe this case involves conceded facts, and we review the trial court's

"[T]he taking of several items during the course of a robbery may not be used to furnish the basis for separate sentences." (*People v. Bauer* (1969) 1 Cal.3d 368, 376-377.) While automobile theft is a violation of property interests to which the proscription against multiple punishments applies (*id*. at p. 378), however, "carjacking is a crime of violence, distinct from robbery, and not merely a violation of the victim['s] property interest in [her] motor vehicle. It is also … distinct from home invasion robbery because it involves the taking of a motor vehicle from the victim['s' person[] or immediate presence." (*People v. Capistrano* (2014) 59 Cal.4th 830, 886-887 (*Capistrano*), overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

Capistrano is sufficiently similar to the present case that we conclude it disposes of Austin's claim. In *Capistrano,* defendant and at least two other men committed two sets of crimes on two different occasions. In the first incident, involving victims J.S. and E.G., the victims were accosted immediately after they pulled into their garage. One of the assailants demanded E.G.'s money at gunpoint, then the men took the victims into the house. Once inside, they repeatedly demanded to know where the money was, and they rummaged through various places in the house. Eventually, J.S. was sexually assaulted. After the men left, the victims found their home ransacked and various items taken. Also taken was the victims' vehicle. (*Capistrano, supra,* 59 Cal.4th at pp. 841-842.)

In the second incident, a woman arrived home after grocery shopping. She pulled into her detached garage and took groceries into her house. When she returned to the garage, she was accosted by two men, one of whom was armed with a gun. This man ordered her into the house. Her husband arrived home and was also accosted. The assailants asked the woman for money and where she kept her car keys. The men took the car keys and Christmas presents. After they left and the police were called, the

---

decision accordingly. Were we to review the matter as a question of law, however, our conclusion would be the same.

victims discovered numerous items were missing from the house. The woman's car was also missing. (*Capistrano, supra*, 59 Cal.4th at pp. 842-843.)

On appeal, the defendant contended, in pertinent part, that the trial court violated section 654 by sentencing him to consecutive sentences on the robbery and carjacking counts involving E.G. and J.S., and also on the carjacking and robbery counts involving the second pair of victims. (*Capistrano, supra*, 59 Cal.4th at p. 885.) He argued that in each incident, the carjacking and robbery were part of a single transaction or course of conduct, "beginning when the victims were removed from their cars and ending only when defendants left with the stolen items, which included the vehicles," so that his sentences on the carjacking counts should have been stayed. (*Capistrano, supra*, 59 Cal.4th at pp. 885, 887.) Our state high court disagreed, explaining:

> "Defendant was charged in each incident with, and the jury convicted him of, two distinct crimes of violence against the victims, robbery and carjacking. The temporal proximity of the two offenses is insufficient by itself to establish that they were incident to a single objective. Rather, viewing the evidence in the light most favorable to the trial court's ruling, we affirm its conclusion that defendant harbored separate objectives for each offense and was appropriately punished for both.
>
> "Defendant and his cohorts confronted the victims at two points. They first accosted them at their cars and then again, inside the victims' residences when they demanded the victims' money and property. Had defendant simply intended to commit a carjacking, he could have done so at the initial point of contact. The evidence reveals, however, that defendant had another, distinct purpose — to rob (and commit other crimes) inside the victims' homes. The elevation of the threat to the victims by forcing them into their homes where defendant committed additional crimes amounts to a separate criminal objective. [Citation.] Accordingly, we find no error in the court's refusal to stay the sentence on the carjacking counts." (*Id*. at p. 887.)

Austin's attempts to distinguish *Capistrano* are unpersuasive. So is his attempt to bring the facts of his crimes within the purview of the California Supreme Court's more recent discussion of section 654, *People v. Corpening* (2016) 2 Cal.5th 307 (*Corpening*).

In *Corpening*, the victim and his son loaded their van with valuable coins they were planning to sell at a swap meet. The van was parked in the driveway in the front of their home. While the son went to lock the house, the victim got into the driver's seat and prepared to pull away. At that moment, he was accosted at gunpoint and ordered out of the vehicle. The victim complied, but then attempted to prevent his assailant from climbing into the van. They struggled, but the assailant managed to drive off. He picked up a confederate, and the two were followed by several other accomplices, one of whom was Corpening. At an apartment complex, the group began unloading the boxes of coins. Eventually, Corpening pled guilty to carjacking and robbery, among other offenses. The basis for his plea on those counts was that his accomplice took a motor vehicle in the victim's possession by force and fear, and also took personal property from the victim's person, possession, and immediate presence by force and fear. The personal property in question was inside the vehicle at the time the vehicle was forcefully taken. The trial court imposed consecutive sentences for the carjacking and robbery. (*Corpening*, *supra*, 2 Cal.5th at pp. 309-310.)

The California Supreme Court held that section 654 did not permit punishment under both provisions. (*Corpening*, *supra*, 2 Cal.5th at p. 309.) The court stated: "Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act — i.e., a course of conduct — do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives." (*Id*. at pp. 311-312.) The court then went on to explain:

> "Whether a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses. [Citations.] On these facts, the forceful taking of a vehicle on a particular occasion is a single physical act under section 654. The forceful taking of [the victim's] van, and the rare coins contained therein, completed the actus reus for robbery — the felonious taking of another's personal property by force. Precisely the same action, not a separate but related one taken at a separate time or in a distinct fashion, was also the basis for the contention that the defendant completed the actus reus for carjacking — the felonious taking of another's motor vehicle by force. It was the same show of force — committed at the same time, by the same person — that yielded for Corpening and his coconspirators the rare coins contained within the carjacked van, giving rise to the robbery conviction. Neither offense was accomplished until completion of the single forceful taking identified by the prosecution as the basis for conviction under the carjacking and robbery statutes. These circumstances render it all but impossible to accept the contrary contention that the forceful taking in this case constitutes multiple physical acts for purposes of section 654." (*Id*. at pp. 313-314, fns. omitted.)

The high court emphasized that the forceful taking of the victim's van "was a single physical act for purposes of section 654 because that act simultaneously accomplished the actus reus requirement for both the robbery and carjacking." (*Corpening*, *supra*, 2 Cal.5th at p. 315.) It did not matter that the act could be broken down into constituent parts, such as forcing the victim from the vehicle, struggling with him as he attempted to resist, and then driving off with the van: "[T]hese were nothing more than components of a single physical act because none of these acts on their own completed the actus reus required for the relevant crimes.… Only the forceful taking of the van — and with it, of the rare coins contained therein — did so." (*Ibid*.) Since a single physical act served as the basis for convicting Corpening of two separate crimes, section 654 did not permit the imposition of separate punishments, regardless of whether the forceful taking involved multiple intents and objectives. (*Corpening*, *supra*, at p. 316.)

If, in the present case, Austin had been convicted of robbery and carjacking based on the taking of F.C.'s Highlander and what it contained at the time force and/or fear was applied, *Corpening* would control. Unlike in *Corpening*, however, there was not simply one forceful taking or one physical act. Rather, there were multiple applications of force or fear, and multiple takings, that were separated both physically and temporally. They were not merely components of a single physical act. Rather, Austin had time to reflect between offenses, and each offense created a new risk of harm. (See *People v. Felix* (2001) 92 Cal.App.4th 905, 915.)

Since we are confronted with a course of conduct, rather than a single physical act, we must consider Austin's intent(s) and objective(s). (See *Corpening*, *supra*, 2 Cal.5th at p. 312.) As in *Capistrano*, *supra*, 59 Cal.4th at page 887, the trial court properly could find from the evidence that Austin harbored multiple, albeit perhaps simultaneous, intents and objectives. To say the taking of the vehicle (carjacking) and the taking of the household items and cash (robbery) furthered the single intent and objective of stealing is too " 'broad and amorphous' [a] view of the single 'intent' or 'objective' needed to trigger the statute [that] would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment.' " (*Harrison*, *supra*, 48 Cal.3d at pp. 335-336.)

Section 654 did not preclude separate punishments. The trial court did not err.

B. <u>Senate Bill No. 620</u>

In sentencing Austin, the trial court imposed a firearm enhancement on counts I and II. The court found several circumstances in aggravation and none in mitigation, but chose to use the circumstances in aggravation to justify consecutive sentences rather than aggravated terms. The court observed: "Mr. Austin certainly could have faced the aggravated term based on his record and based on the circumstances of this case, but because the Court is imposing consecutive sentences on Count[s I] and [II] when the Court could in its discretion impose concurrent sentences, I think the midterm is

appropriate in this instance. 32 years and four months is a significant amount of time, and I think it is justified by the conduct here."

At the time Austin was charged, convicted, and sentenced, section 12022.53, subdivision (h) provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Thus, imposition of both firearm enhancements was mandatory.

After Austin was sentenced, but while his appeal was still pending, the Legislature enacted Senate Bill No. 620. (Stats. 2017, ch. 682, § 2.) Effective January 1, 2018, subdivision (h) of section 12022.53 provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Austin's case was not yet final when the foregoing amendment went into effect. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.) In light of this fact and the fact section 12022.53, subdivision (h) now vests the trial court with authority to lower Austin's sentence, we conclude the amendment applies to the instant case. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679; see *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

The Attorney General concedes the amendment applies to Austin, but argues a remand is not appropriate because there is no reason to believe the trial court would exercise its discretion to strike either firearm enhancement. The Attorney General points to the multiple circumstances in aggravation, the absence of any mitigating circumstances, the circumstances of the offense, and the court's statement the sentence imposed was justified by Austin's conduct. While we acknowledge these factors, we conclude the record does not clearly indicate the trial court would not have exercised its discretion to strike one or both firearm enhancements had it known it had that discretion.

(Compare *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 & *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428 with *People v. McVey* (Jun. 12, 2018, B280966) ___ Cal.App.5th ___, ___-___ [2018 Cal.App. Lexis 536, *19-*21].) Accordingly, we will remand the matter to afford the trial court the opportunity to consider striking one or both of the firearm enhancements.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to exercise its discretion under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018), and, if appropriate following exercise of that discretion, to resentence Austin accordingly. If the trial court resentences Austin, it shall cause to be prepared an amended abstract of judgment that reflects the new sentence, and shall cause a certified copy of same to be transmitted to the appropriate authorities.

_____

ELLISON, J.[†]

WE CONCUR:

_____

SMITH, Acting P.J.

_____

MEEHAN, J.

[†] Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.